

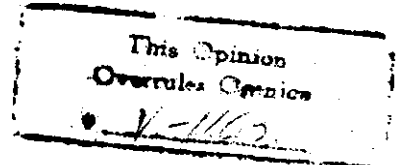


**THE ATTORNEY GENERAL
OF TEXAS**

**CRAWFORD C. MARTIN
ATTORNEY GENERAL**

AUSTIN, TEXAS 78711

December 22, 1970



Hon. Gerald W. Schmidt
County Attorney
Gillespie County Courthouse
Fredericksburg, Texas 78624

Opinion No. M-758

Re: Authority of commissioners
court to lease land for
different purpose than
that for which land was
acquired.

Dear Mr. Schmidt:

Your recent request for an opinion of this office concerning the above captioned matter reads, in part, as follows:

"The Commissioners Court of Gillespie County purchased approximately 356 acres of land in Gillespie County in 1946 from various individuals for the construction and operation of an airport. Prior to the purchase, a bond issue was passed authorizing the purchase of such land. The land was conveyed to Gillespie County by general warranty deeds without any restrictions.

"The airport was constructed and since such time has been in operation and use as a public airport, maintained by Gillespie County. As in most cases of public airports, the entire tract purchased is not necessary for the operation of the airport. Now Gillespie County Fair Association desires to lease a portion of the land originally purchased for an airport for the purposes of erecting exhibition halls, grandstands, baseball diamonds, a race track for horses and any other building or improvement necessary for the purpose of conducting a county fair. The Association will finance the cost of construction of these improvements and any other necessary improvements. The Association desires a long term lease, perhaps a 99 year lease. Admission charges will be collected by the Association to defray the expenses of the entertainment conducted by the fair association.

"The question I am submitting for an attorney general's opinion is as follows: Can the Commissioners

Court of Gillespie County legally lease a portion of the land acquired by Gillespie County for an airport, to the Gillespie County Fair Association for the purpose of erecting any and all improvements necessary for the conducting of a county fair and for the actual conducting of such fair?"

Our answer is "yes", under the facts related, Gillespie County may lease a portion of the 356 acres to the Gillespie County Fair Association.

The powers of the commissioners court to lease airport property are contained both in Article 2351, Vernon's Civil Statutes, and 1269h, Section 1.

Article 2351 reads, in part, as follows:

"18(a) The Commissioners Court of each county of this State, in addition to the powers already conferred on it by law, is empowered in all cases where said county has heretofore acquired, or may hereafter acquire, land for an airport . . . to lease said land and/or the facilities thereof, or any part thereof to any person or corporation upon such terms as the commissioners court shall deem advisable for airport purposes, or other purposes, provided any such lease is not inhibited by the terms of the grant to such county. Said counties through such commissioners courts are also hereby expressly authorized and empowered to contract with reference to oil, gas or other minerals or natural resources . . ." (Emphasis added.)

It can readily be seen that the legislature has set out three categories of authorized leases in Article 2351: (1) for airport purposes, (2) for development of natural resources and (3) other purposes. Such are in addition to all other powers previously conferred upon the court.

Article 1269h, Section 1 D and E, Vernon's Civil Statutes, as amended by the Acts of the 50th Legislature, 1947, also provides authority for the commissioners court to lease airport property; however, that grant of authority to lease is more limited in nature. Section D thereof authorizes that such property may be leased for airport purposes. Section E provides specific authority to lease to the Federal Government, State Government or any person, firm or corporation. The general tenor of

Section D leads to the conclusion that the legislature intended to authorize use of land, under this section, for airport purposes, and such Sections D and E are not extended to additional usage. See Attorney General's Opinions O-5230 (1943) and V-1162 (1951). The latter opinion, however, insofar as it does not consider Article 2351 and deals alone with Article 1269h as if it were the only authority to lease airport land must be hereby overruled.

The right of the county to take, enjoy and have full use of property is contained in Article 1576, Vernon's Civil Statutes, which reads as follows:

"All deeds, grants and conveyances heretofore or hereafter made and duly acknowledged, or proven, and recorded as other deeds of conveyance, to any county, or to the courts or commissioners of any county, or any other person or persons, by whatever form of conveyance, for the use and benefit of any county, shall be good and valid to vest in such county in fee simple or otherwise all such right, title, interest and estate as the grantor in any such instrument had at the time of the execution thereof in the lands conveyed and was intended thereby to be conveyed."

Our Supreme Court considered this Article, which at the time was Article 680, in the case of SCalf v. Collin County, 80 Tex. 514 (S.Ct. 1891). Therein the court stated:

"Articles 680 . . . of the Revised Statutes contain an express recognition of the right of counties to take title to and enjoy real estate without any limitation being expressed as to the purposes for which it shall be used." Bell County v. Alexander, 22 Tex. 350 (1858) is cited in support thereof.

We note that the conveyance of the subject property was to the county without limitation.

The general rule is stated in 63 A.L.R. 615 as follows:

"It is generally held that a municipal corporation has the right to rent municipal property to private persons where such a right is conferred,

either expressly or by necessary implication, by the charter of the municipality or by statutory enactment."

The concept of leasing public property by the commissioners court is not repugnant to our courts.

The use of public property for public good was recognized in the early case, Bell County v. Alexander, 22 Tex. 351 (1858), supra, wherein at page 359 the court stated:

"There is as little doubt of the capacity of the county to take an estate in lands, by grant or devise. The statute declares that 'each county which now exists, or which may be hereafter established in this state, shall be a body corporate and politic.' They may sue and be sued, plead and implead. They may take and hold, and dispose of, private property for municipal purposes or such uses and purposes as subserve the public good, . . ." (Emphasis added.)

In 133 A.L.R. 1245 it is stated:

"If the use of property by the public is not interfered with ~~by a lease of a portion thereof,~~ or by a lease for a limited time only, it has been held that such a leasing is within general municipal powers."

"Public good" or "public use" are terms that need to be redefined with each new circumstance or set of facts. It would appear that, in the subject instance, it is in the public good to use a portion of the purchased property as an airport. It would likewise appear to be contrary to public good to allow the unused portion of this tract to lie fallow. Public use and public purpose were discussed in Ex parte Conger Ex parte Buford, 357 S.W.2d 740 (Tex.Sup. 1962) at page 741 where the court stated:

"No all-inclusive judicial definition of that term has been attempted by the courts, but each case is to be determined by its own peculiar circumstances. Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699. While there are two views as to what constitutes 'a public use', one being more restrictive than the other, nevertheless where there

exists the direct use or right of use of the utility on the part of the public or even some limited portion of the public, all agree it is a public use. 73 C.J.S. Public p. 280."

Our courts have approved the sublease by a city of the excess space in a city office, even where such sublease was within the intent of the city prior to its lease of the entire building. City of Mission v. Richards, 274 S.W. 269 (Tex.Civ.App. 1925, writ dismiss.)

Any prohibition against the use of the "excess" property involved, as being opposed to the dedication of the property to a public use, should be dispelled by the courts definition of "airport" in Moore v. Gordon, 122 S.W.2d 239 (Tex.Civ.App. 1938, writ dismiss.), which states:

"An airport, within the meaning of the law, includes all lands, buildings, structures or other improvements necessary or convenient in the establishment and operation of an airport." (Emphasis added.)

In the Moore case the court held that the entire tract, because of extensive airport improvements, was dedicated to the public. We distinguish the Moore case, on the public dedication point, from the Gillespie County situation because of your statement that the entire 356 acres is not necessary for the operation of the airport.

It is assumed from the facts stated in your letter that the proposed lease for fair purposes would not interfere with the primary use of the property as an airport. Such use of county property was considered by the court in the case of Dodson v. Marshall, 118 S.W.2d 621 (Tex.Civ.App. 1938, writ dismiss.), wherein the court approved of a month to month rental of a space in the county courthouse for the operation of a cigar and drink stand. The court posed the following question.

"Has there in fact been such a diversion of a material part of the premises as to interfere with the use of the property as a whole for the purposes for which it is intended?"

The court held that it was not.

We believe that Article 2351, Vernon's Civil Statutes, in its expression of authority of commissioners courts to lease

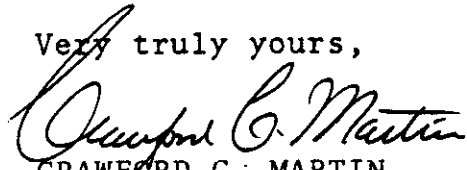
airport property for ". . . other purposes . . .", is sufficient in light of the above case law to allow the proposed lease at least to the extent of the property not necessary for reasonable airport operation.

A copy of the proposed lease between the county and the Fair Association was not furnished this office. We therefore make no comment as to its specific validity other than to mention that a lease term of the property for 99 years, as set out in your letter, might violate Article I, Section 26 of the Texas Constitution concerning perpetuities and monopolies.

S U M M A R Y

A commissioners court has authority under Article 2351, V.C.S., to lease airport property to a fair association, so long as lessee's use does not interfere with the reasonable use and operation as an airport. Attorney General's Opinion No. V-1162 (1951) is overruled to the extent of any conflict with this opinion.

Very truly yours,



CRAWFORD C. MARTIN
Attorney General of Texas

Prepared by Melvin E. Corley
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